IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE K.S.RADHAKRISHNAN
&
THE HONOURABLE MR. JUSTICE THOTTATHIL B.RADHAKRISHNAN
&
THE HONOURABLE MR. JUSTICE M.N.KRISHNAN

FRIDAY, THE 25TH MAY 2007 / 4TH JYAISHTA 1929

WA. No. 206 of 2007

AGAINST THE JUDGEMENT IN WPC.14954/2006
.....

APPELLANT: PETITIONER

A.N.PONNAPPAN, AGED 53,
S/O.NARAYANAN, ANCHAPARAYIL HOUSE,
S.N.JUNCTION, KATTAPPANA, IDUKKI DISTRICT.

BY ADV. SRI.VARGHESE C.KURIAKOSE

RESPONDENTS: RESPONDENTS
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1. KERALA FINANCIAL CORPORATION,
HEAD OFFICE, VELLAYAMBALAM, TRIVANDRUM,
REP. BY ITS MANAGING DIRECTOR.

2. THE BRANCH MANAGER,
KERALA FINANCIAL CORPORATION,
KATTAPPANA, IDUKKI DISTRICT.

BY ADV. SRIM. PATHROS MATTHAI (SR ADVOCATE)
SRI.V.B.UNNIRAJ
SRI.K.SANKARA PILLAI

THIS WRIT APPEAL HAVING BEEN FINALLY HEARD
ON 28/03/2007, ALONG WITH WA NO. 219 OF 2007
THE COURT ON 25/05/2007 DELIVERED THE FOLLOWING:

K.S. RADHAKRISHNAN,
THOTTATHIL B. RADHAKRISHNAN &
M.N. KRISHNAN, JJ.

Writ Appeal Nos. 206 and 219 of 2007

Dated: 25th May, 2007.

JUDGMENT

K.S. Radhakrishnan, J.

Whether the Kerala Financial Corporation while invoking the provisions of Section 29 of the State Financial Corporations Act, in short SFC Act, can proceed against the properties offered by the sureties as collateral security for the loan advanced by the Corporation, is the question that is posed for our consideration. Referring Bench noticed the conflict between the ruling of a Division Bench of this court in Thressiamma Varghese v. Kerala State Financial Corporation (1986 KLT 1344) and that of a Division Bench of the Karnataka High Court in Narasimhaiah v. Karnataka State Financial Corporation (AIR 2004 Karnataka 46) and felt that the matter requires an authoritative pronouncement by a larger bench. Reference was also made to the judgment of a learned single judge of this court in K.T. Joseph v. Kerala Financial Corporation (1989 (1)

KLJ 461).

2. The Division Bench of this court in Thressiamma Varghese's case, supra took the view that a reading of Sections 29, 31 and 32 of the SFC Act would show that the Corporation can proceed against the mortgaged property not belonging to the industrial concern but belonging to third party sureties for realisation of the loan amount. The Bench took the view that Section 29 does not make any distinction between assets of the industrial concern and assets not belonging to the industrial concern but nevertheless mortgaged to the Corporation and held that both kinds of assets can be proceeded against under Section 29 and it is not possible to read into Section 29 a restriction to the effect that the right conferred on the Corporation thereunder is restricted to the right to proceed only against property belonging to the industrial concern and mortgaged to the Corporation. The Bench also referred to the decision of a Division Bench of the Allahabad High Court in U.R.F. Corporation v. M/s D.I.(P) Ltd. (1971) A.L.J. 756) and the Full Bench decision of the same court in Munnalal v. U.P. Financial Corporation (AIR 1975 All. 416) and held that it is in agreement with the decision of the Division Bench in U.R.F. Corporation's case, supra and expressed

respectful disagreement with the view expressed by the Full Bench in Munnalal's case, supra. Later a Division Bench of the Orissa High Court in Miss K.T. Sulochana Nair v. Managing Director, Orissa State financial Corporation and others (AIR 1992 Orissa 157) held that under Section 29 (1), the Corporation has the right to take over the management or possession of both of the industrial concern as well as the right to transfer by way of lease or sale and realise the property pledged, mortgaged, hypothecated or assigned to the Financial Corporation and that there is nothing in the provision to indicate that the right under Section 29 of the Act is only in respect of the property of the loanee mortgaged with the Corporation. Court held that all properties mortgaged with the Corporation would come within the purview of Section 29 of the Act including the properties of a guarantor or surety. Orissa High Court however explained the Full Bench decision of the Allahabad High Court in Munnalal's case and took the view that the conclusion reached by the Full Bench of the Allahabad High Court would not apply to an action under Section 29 of the Act.

3. The Division Bench of the Punjab & Haryana High Court had occasion to consider a similar issue in Jasbir Kaur and another

v. Punjab State Industrial Development Corporation Limited. (AIR 2002 Punjab & Haryana 74). The Court after referring to the decision of the Orissa High Court in K.T.Sulochana Nair's case as well as the decision of this court in Thressiamma Varghese' case and the Full Bench decision of the Allahabad High Court in Munnalal's case, supra, took the view that Section 29 can be invoked by the State Financial Corporation to take over the property of the industrial concern as well as that of the surety or a guarantor. Same question came up for consideration before the Division Bench of the Karnataka High Court recently in N. Narasimhaiah v. Karnataka State Financial Corporation and others (AIR 2004 Karnataka 46). The Court however dissented from the view expressed by the Orissa High Court in Sulochana Nair's case, supra as well as that of the Punjab and Haryana High Court in Jasbir Kaur's case and took the view that Section 29 clearly states that the Financial Corporation shall have the right to take over the management or possession of an industrial concern, but it does not refer to taking over of management or possession of the property belonging to the surety which has been secured in favour of Financial Corporation also opined that the Legislature has been careful in conferring such power only against

the industrial concern and not against the surety and in the absence of an express statutory provision the power to take over the properties cannot be a matter of inference. Court also took the view that in so far as the property of the surety secured in favour of the Corporation, the remedy of the Corporation lies either under Section 31 of the Act or by having recourse to civil court and not under Section 29 of the SFC Act. The Bench also did not accept the views expressed by this court in Thressiamma Varghese' case, supra on the ground that the findings are obiter.

4. We notice conflicting views have been expressed by various High Courts and hence the matter has been placed before us for an authoritative pronouncement on the question involved. The view expressed by this court in Thressiamma Varghese' case, supra, is in direct conflict with the view expressed by the Division Bench of the Karnataka High Court in Narasimhaiah's case. Counsel for the petitioner in W.P.C.No 14954 of 2006 submitted that the Corporation cannot invoke Section 29 of the SFC Act against the sureties or their properties and the remedy available to the Corporation is either to invoke Section 31 of the Act or to take recourse to the remedies available before the civil court. Counsel

for the Corporation has however placed heavy reliance on the Bench of this court in Thressiamma Varghese' case.

5. The State Financial Corporations Act, 1951 was enacted by the Parliament by virtue of the powers conferred on it under Entry 43 of List I of the Constitution. Statement of Objects and Reasons of the State Financial Corporations Act explains the need for the statute in the following terms:

> "In order to provide medium and long-term credit to industrial undertakings, which falls outside the normal activities of commercial banks, a Central Industrial Finance Corporation was set up under the Industrial Finance Corporation Act, 1948 (XV of 1948). The State Government wish that similar Corporations should also be set up in the States to supplement the work of the Industrial Finance Corporation. The intention is that the State Corporations will confine their activities to financing medium and small scale industries and will, as far as possible, consider only such cases as are outside the scope of the Industrial Finance Corporation. The State Governments also consider that State Corporations should be established under a special Statute in order to make it possible to incorporate in the constitution necessary provisions in regard to majority control by Government, guarantee by the State Government in regard to repayment of principal, and payment of a minimum rate of dividend on the shares, restriction on distribution of profits and special powers for the enforcement of its claims and recovery of dues."

It is clear from the above objects and reasons that the Act was

enacted to enable the Corporation to provide long-term credit to industrial undertakings. The Act also says that the provisions contained therein would enable the Corporation to avoid dilatory process and for easy recovery of the amount advanced by the Corporation. Section 25 deals with the business the Corporation may transact subject to the provisions of the Act. Further, sub-section (2) of Section 25 states that no accommodation shall be given under clauses (a), (b) and (g) of sub section (1) unless it is sufficiently secured by a pledge, mortgage, hypothecation etc. Section 29 deals with the rights of the Corporation in case of default. Section 29 of the SFC Act as it originally stood was amended and the words "right to take over the management of the industrial concern" were substituted by Act 77 of 1972 with effect from 30.12.1972. Earlier the words "right to sell" were also substituted by Act 56 of 1956 with effect from 1.10.1956. Section 29 as it stands now reads as follows:

> 29. Rights of Financial Corporation in case of default -
> (1) Where any industrial concern, which is under a liability to the Financial Corporation under an agreement,makes any default in repayment of any loan or advance or any instalment thereof or in meeting its obligations in relation to any guarantee given by the Corporation or otherwise fails to comply

with the terms of its agreement with the Financial Corporation, the Financial Corporation shall have the right to take over the management or possession or both of the industrial concerns, as well as the right to transfer by way of lease or sale and realise the property pledged, mortgaged, hypothecated or assigned to the Financial Corporation.

(2) Any transfer of property made by the Financial Corporation, in exercise of its powers under sub-section (1), shall vest in the transferee all rights in or to the property transferred as if the transfer had been made by the owner of the property.

(3) The Financial Corporation shall have the same rights and powers with respect to goods manufactured or produced wholly or partly from goods forming part of the security held by it as it had with respect to the original goods.

(4) Where any action has been taken against an industrial concern under the provisions of sub-section (1), all costs, charges and expenses which in the opinion of the Financial Corporation have been properly incurred by it as incidental thereto shall be recoverable from the industrial concern and the money which is received by it shall, in the absence of any contract to the contrary, be held by it in trust to be applied firstly, in payment of such costs, charges and expenses and, secondly, in discharge of the debt due to the Financial Corporation, and the residue of the money so received shall be paid to the person entitled thereto.

(5) Where the Financial Corporation has taken any action against an industrial concern under the provisions of sub-section (1), the Financial Corporation shall be deemed to be the owner of such concern, for the purposes of suits by or against the concern, and shall sue and be sued in the name of the concern.

Section 31 of the Act is also extracted below for easy reference.

31. Special provisions for enforcement of claims by Financial Corporation. - (1) Where an industrial concern, in breach of any agreement, makes any default in repayment of any loan or advance or any instalment thereof or in meeting its obligations in relation to any guarantee given by the Corporation or otherwise fails to comply with the terms of its agreement with the Financial Corporation or where the Financial Corporation requires an industrial concern to make immediate repayment of any loan or advance under Section 30 and the industrial concern fails to make such repayment then without prejudice to the provisions of section 29 of this Act and of section 69 of the Transfer of Property Act, 1882 (4 of 1882) any officer of the Financial Corporation, generally or specially authorised by the Board in this behalf,may apply to the district judge within the limits of whose jurisdiction the industrial concern carries on the whole or a substantial part of its business for one or more of the following reliefs, namely:-

(a) for an order for the sale of the property pledged, mortgaged, hypothecated or assigned to the Financial Corporation as security for the loan or advance; or

(aa) for enforcing the liability of any surety; or

(b) for transferring the management of the industrial concern to the Financial Corporation; or

(c) for an ad interim injunction restraining the industrial concern from transferring or removing its machinery or plant or equipment from the premises of the industrial concern without the permission of the Board, where such removal is apprehended.

(2) An application under sub-section (1) shall state the nature and extent of the liability of the industrial concern to the Financial Corporation, the ground on which it is made and

such other particulars as may be prescribed.

Apex court had occasion to consider the scope of Sections 29 and 31 in A.P. State Financial Corporation v. Gar Re-rolling Mills (1994 (2) SCC 647). Apex court took the view that Section 29 of the Act deals with not only the rights of the Corporation in cases of default by the industrial concern, but also provides for a remedy to take over the management of the defaulting industrial concern with or without possession as well as the right to transfer by way of lease or sale of the hypothecated property to realise its dues. The court held that since Section 29 of the Act provides both the rights and the remedies as also the procedure for enforcement of the rights and is a complete code in itself, it is open to the Corporation to act under Section 29 of the Act. The apex court held that the Corporation does not require the assistance of the court to enforce its rights while invoking the provisions of Section 29 of the Act to recover its dues from the defaulting concern. Apex court also examined the scope of Section 31 as well and held as follows:

> Section 31 of the Act has been enacted also to take care of a situation where any industrial concern, in breach of any agreement, makes default in repayment of the loan or advance or any instalment thereof or the Corporation requires

> immediate repayment which the defaulting industrial concern fails to make. The Corporation may in any such event without prejudice to its rights and remedies under Section 29 of the Act, apply to the District Judge within the local limits of whose jurisdiction, the industrial concern carries on the whole or a substantial part of its business inter alia for any of the following orders -
>
> (a) for the sale of the property pledge, mortgaged, hypothecated or assigned to the Corporation as security for the loan or advance;
>
> (b) for transferring the management of the industrial concern to the Corporation; and
>
> (c) for an ad interim injunction restraining the defaulting industrial concern from transferring or removing its machinery or plant or equipment or any other material from the premises of the concern without the permission of the Board.

Section 31 in terms provides that any such application may be filed without prejudice to the provisions of Section 29 of the Act and of Section 69 of the Transfer of Property Act, 1882. The court held that on a conjoint reading of Sections 29 and 31 of the Act, it appears that in case of default in repayment of loan or any instalment or any advance or breach of an agreement, the Corporation has two remedies available to it against the defaulting industrial concern; one under Section 29 and another under Section 31 of the Act. Court also examined the meaning of the expression “without prejudice to the provisions of Section 29 of this Act” in Section 31 of the Act and

held that the legislature did not intend to confine the Corporation to recourse to only a particular remedy against the defaulting industrial concern for recovery of the amount due to it. Corporation however cannot simultaneously pursue two remedies at the same time. The choice for availing the remedy under Section 29 or Section 31 of the Act is that of the Financial Corporation alone and the defaulting concern has no say whatsoever in the matter as to which remedy should be taken recourse to by the Corporation against it for effecting the recovery.

6. The Financial Corporation can invoke Section 29 of the Act only if the industrial concern makes a default in repayment of the loan or any instalment or any advance or breach of an agreement thereof. Corporation also can meet its obligation in relation to any guarantee given by the Corporation or otherwise fails to comply with the terms of its agreement. Section 29 (1) has got two parts. First part of Section 29 (1) enables the Financial Corporation to acquire management or possession or both of the industrial concern as well as the right to transfer by way of lease or sale. Second part of Section 29 (1) says that the Financial Corporation can realise the property pledged, mortgaged, hypothecated or assigned to the

Financial Corporation when the industrial concern is under a liability. Properties that were assigned to the Financial Corporation for the advancement of the loan are not only the properties of the industrial concern which has been pledged, mortgaged or hypothecated but also the properties of sureties pledged, mortgaged or hypothecated for meeting the liability of the industrial concern. Once industrial concern commits default in repayment of the loan or advance made by the Financial Corporation and under a liability, the right of the Corporation to invoke Section 29 of the SFC Act accrues and it is open to the Corporation to realise the entire loan advanced to the industrial concern not only from the properties of the industrial concern but also from the properties pledged or mortgaged by the sureties for the loan advanced by the Corporation. Properties pledged, mortgaged or hypothecated by the sureties also form integral part of the loan transaction and have no separate existence. If the contention of the surety is accepted then the Corporation has to take recourse to Section 29 for realisation of the loan as against the principal debtor and against the sureties proceedings have to be initiated separately under Section 31 of the Act or Corporation has to approach the civil court. Adopting different modes of recovery

would in our view frustrate the very object of the Act for speedy recovery of the amount in case of default. Section 29 is a general provision which does not impose any fetter on the power of the Corporation to proceed against the property of the surety and that provision can be invoked when the industrial concern is under a liability. The liability of the principal and surety is always joint and co-extensive. Section 128 of the Contract Act lays down that the liability of the surety is co-extensive with that of the principal debtor unless it is otherwise provided by the contract. Such liability of the surety is co-extensive with that of the liability of the principal debtor to pay the entire amount if the liability is immediate and the creditor can proceed against the principal debtor or against the sureties. Further in the absence of any special equity the surety has no right to restrain an action against him by the creditor on the ground that the principal is solvent or that the creditor may have relief against the principal debtor in any other proceeding. Since the liability is co-extensive with that of the principal unless there is specific exclusion in Section 29 of the Act relieving the liability of the surety or guarantor, in our view, a creditor enforcing the liability as against the principal debtor can also proceed against the surety as

well unless there is statutory exclusion. Section 29 in our view does not confer any statutory exclusion as against the surety.

7. Section 31 deals with “special provisions” which enables the Financial Corporation to recover the entire amount either proceeding against the principal debtor or against the properties of the surety so mortgaged. Even if the Financial Corporation invoked Section 31 the right of the Corporation to proceed against the principal debtor, sureties etc. under section 29 is in tact since Section 31 is being invoked without prejudice to the provisions of Section 29 of the Act and of Section 69 of the Transfer of Property Act, 1882. While invoking Section 31 of the Act the Corporation can also proceed against the properties of the industrial concern as well as the properties of the sureties, so also when it invokes Section 29 of the Act. Section 29 provides both the rights and remedies and also the procedure for enforcement of the rights and is a complete code in itself meaning thereby the Corporation can enforce its claim fully not only by proceeding against the properties of the industrial concern as well as the properties of the surety mortgaged to the Corporation, so also to fully extinguish the liability of the industrial concern.

8. Division Bench of this court in Thressiamma Varghese' case held that the Corporation could proceed against the mortgaged property of a surety in an application presented before the District Judge under Section 31 and the application has to be disposed of in accordance with the procedure contemplated under Section 32. We are in the case on hand not concerned with an application under Section 31 but an action of the Corporation under section 29 against the industrial concern and the surety. We therefore fully endorse the view of the Division Bench in Thressiamma Varghese' case and hold further that Section 29 is a general provision which does not impose any fetter on the power of the Corporation to proceed against the properties of security.

9. We find therefore unable to subscribe to the view expressed by the Division Bench decision of the Karnataka High Court in Narasimahaiah's case. Karnataka High Court in Narasimahaiah's case took the view that in the absence of any express statutory provision, the power to take over the properties of another without intervention of Court cannot be as a matter of course. Section 29, in our view, is a complete code by itself which would enable the Corporation to recover the amount due to it fully by proceedings not

only against the industrial concern but also against the sureties or guarantors who undertook to discharge the liability of the principal debtors. We have already indicated that the liability of the surety is co-extensive with that of the principal debtor and the liability is joint and several.

10. We therefore answer the reference holding that the Financial Corporation can proceed not only against the property of the industrial concern but also against the properties of the sureties also while invoking Section 29 of the SFC Act. We therefore find no error in the judgment of the learned single judge in dismissing the writ petition. Appeals therefore lack merits and they are dismissed and the reference is answered accordingly.

Sd/-

K.S. RADHAKRISHNAN
Judge

Sd/-

THOTTATHIL B. RADHAKR8ISHNAN
Judge

Sd/-

M.N. KRISHNAN
Judge

25/05/2007en [true copy]